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No. 87-633

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

APEX OIL COMPANY,

Petitioner,

—against—

JOSEPH DiMAURO, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents Joseph DiMauro, Triad Petroleum, Inc., and TIC Commodities, Inc.[1] (collectively, "DiMauro") oppose the petition by Apex Oil Company ("Apex") for a writ of certiorari to the United States Court of Appeals for the Second Circuit on the following grounds:

I.

There was no misapplication of any decision of this Court

Apex argues that the Court of Appeals misapplied this Court's decision in *Monsanto Co.* v. *Spray-Rite Service Co.*, 465 U.S. 752 (1984), by failing to reverse as to DiMauro on the ground that only "slight evidence" is necessary to link them to the alleged conspiracy. Apex is wrong for several reasons:

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1 There are no parent, subsidiary or affiliate corporations of these respondent corporations. Cf. Supreme Court Rule 28.1.

1. The Court of Appeals took express cognizance of the so-called "slight evidence" standard (A-26), but found that Apex had not satisfied it as to DiMauro. Apex is simply asking this Court to review and refind the facts of this case. That is not a "special and important reason" for this Court to hear this case. Cf. Supreme Court Rule 17.

2. The decisions below are consistent with, not in conflict with, the decisions of this Court. The "slight evidence" standard is stated in decisions in the Courts of Appeal (not this Court) which preceded this Court's decisions in *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 89 L.Ed.2d 538 (1986)[2] and *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 574, 91 L.Ed.2d 202 (1986). As the Court stated in *Anderson*:

> "Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it up to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the

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2 *Matsushita* amplified upon and refined *Monsanto*, explaining how *Monsanto* should be applied on a motion for summary judgment in a complex antitrust case such as this. Significantly, Apex does not accuse the Courts below of misapplying *Matsushita*; rather, it virtually ignores that later, controlling decision. Apex now pitches its argument on *Monsanto* (Petition, at 22-23), a decision which Apex argued in the District Court was inapplicable since it involved only the rights of distributors and was not decided on summary judgment (Apex's Memorandum in Opposition to Defendants' Six Motions for Summary Judgment, at pp. 131-33).

party producing it, upon whom the onus of proof is imposed."

91 L.Ed.2d at 213 (emphasis in original), quoting from *Improvement Co.* v. *Munson*, 14 Wall 448, 20 L.Ed. 867 (1872). The decisions below, dismissing the case as to DiMauro, are fully consistent with those authorities, which are controlling at bar. Apex does not even argue, much less show, that the decisions below conflict with *Matsushita*. If and to the extent that the "slight evidence" cases are inconsistent with *Matsushita* and *Anderson* (a matter which this Court need not determine here, since the Court of Appeals found that Apex failed to satisfy even the "slight evidence" standard), they must give way to those controlling pronouncements of this Court.

3. Apex has misstated the facts and the alleged evidence as to DiMauro in order to exaggerate and speculate about his conduct. Both Courts below, upon a careful and detailed examination of the record, correctly found that there was *no evidence* to link DiMauro to the alleged conspiracy, but rather only conjecture, hearsay and suspicion. For example, the allegation that DiMauro called a meeting of longs (cf. Petition, at 10) is based upon only rumor and hearsay; indeed, the alleged sources of that rumor[3] and hearsay expressly denied that DiMauro did so or that they had even said that he did (see, e.g., JA 5346-48). Both the District Court and the Court of Appeals properly recognized the non-probative nature of Apex's proffers vis-a-vis DiMauro.

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3 Rumors are, of course, inadmissable hearsay and of noprobative value. See, e.g., *Pink Supply Corp. v. Hiebert, Inc.*, 612 F.Supp. 1334, 1346 (D. Minn. 1985); *Hawk v. Brosha*, 590 F.Supp. 337, 340 (E.D. Pa. 1984) ("rumors . . . are hearsay and hence inadmissible, and for that reason do not suffice to create as issue of material fact . . ."). See also: *Oreck Corporation v. Whirlpool Corporation*, 639 F.2d 75, 81 n. 35 (2d Cir. 1980), cert. denied, 451 U.S. 1083 (1981); *U.S. v. Cirillo*, 499 F.2d 872 (2d Cir. 1974), cert. denied, 419 U.S. 1056 (1975). Such "evidence" could not and did not create a "genuine issue of material fact", as required by *Matsushita* (89 L.Ed.2d at 551-52).

II.

Apex has not been deprived of its constitutional right to a jury trial

Apex argues here (although it did not do so in the District Court) that the grant of summary judgment resulted in "the unconstitutional abrogation of the Seventh Amendment right to a jury trial" (Petition, at 20). Apex is wrong, having overlooked this Court's recent decisions in *Tull* v. *United States*, 481 U.S. ____, 95 L.Ed.2d 365, 374 (1987) and *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 91 L.Ed.2d 265 (1986).

In *Tull*, the Court expressly rejected, as "without merit", the argument that permitting the trial court to take a case away from the jury would improperly "destroy the constitutional right of trial by jury", explaining:

> "The defendant was, of course, entitled to have a jury summoned in this case, but that right was subject to the condition, fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict, according to the law if the evidence is uncontradicted and raises only a question of law."

95 L.Ed.2d at 574, quoting from *Hepner v. United States*, 213 U.S. 103, 115 (1909). Similarly, in *Celotex*, the Court explained:

> "Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis."

91 L.Ed.2d at 276. Accord: *Anderson*, *supra* (91 L.Ed.2d at 213-214) (summary judgment standard "mirrors the standard for a directed verdict").

The right to a jury trial is not a right to go to the jury on a claim for which the plaintiff is unable to adduce evidence sufficient to raise a genuine issue of material fact. That is especially so where, as here, the plaintiff has been called on to do so on the eve on the trial, after years of intensive and extensive discovery, including more than 140 depositions and production of scores of thousands of documents. See, e.g., *Matsushita, supra* (475 U.S. 574).

Conclusion

The decision of the Court of Appeals is fully in accord with this Court's recent salient pronouncements on the subjects of summary judgment, antitrust conspiracy, and the right to a jury trial. It warrants no review on certiorari by this Court.

November 10, 1987

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